PP

v.

GAN BOON AUN & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: W-09-258-11-2011]
6 SEPTEMBER 2013

CIVIL PROCEDURE: *Appeal - Notice of appeal - Application to amend - Omission to include name of second respondent - Discretion of court - Objection to allow amendment - Whether objection misconceived - Whether appeal filed within time - Whether amendment allowed - Whether prayer to file amended notice of appeal out of time becomes academic once amendment allowed - Rules of the Court of Appeal 1994, r. 4*

CIVIL PROCEDURE: *Amendment - Notice of appeal - Application for - Omission to include name of second respondent - Discretion of court - Objection to allow amendment - Whether objection misconceived - Whether appeal filed within time - Whether amendment allowed - Whether prayer to file amended notice of appeal out of time becomes academic once amendment allowed - Rules of the Court of Appeal 1994, r. 4*

The respondents were charged in the Sessions Court for an offence under the Securities Industry Act 1983 ('Act'). At the end of the prosecution case, the learned Sessions Judge ruled that a *prima facie* case had been established and called for the defence. At the commencement of the defence case, the defence made an application for referral of a constitutional question to the High Court, which was permitted by the Sessions Court. The High Court ruled in favour of both the accused and held that s. 122(1) of the Act was inconsistent with art. 5(1) of the Federal Constitution as it contravened the presumption of innocence and ought to be struck down as unconstitutional. Being dissatisfied, the prosecution filed an appeal against the said decision by naming only the first respondent and had omitted to include the name of the second respondent in the notice of appeal. As a consequence, *vide* encl. 8(a), the prosecution filed an application to amend the notice of appeal to include the second respondent, whose name

was inadvertently left out and as a measure of prudence, sought leave to file the amended notice of appeal out of time. The second respondent, however, opposed the said application.

Held (allowing application in encl. 8(a))
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) When the statute places judicial discretion on the court to condone or not to condone an irregularity, whether it is substantive or procedural, the court has wide discretion to act and decide upon it judiciously and not arbitrarily. Judicially means taking into cognisance the jurisprudence, as well as the judgments of other courts and very importantly, the facts of the case, public interest and constitutional importance of the matter, *etc*. No case will be binding on the court where the facts are different. (para 11)

(2) The respondent's application to object to the application was abhorrent to the notion of justice and fair play and must also be seen to be an abuse of process of the court, more so when it is an attempt to obstruct a constitutional question to be ventilated by the apex court which the respondent himself had raised. Further, the respondent's objection was misconceived since the appeal against the constitutional question had been filed within time. (para 15)

(3) The Rules of the Court of Appeal 1994 ('RCA') gives very wide powers to the court to exercise its discretion according to the justice of the case, whether or not it is a civil or criminal case. Further, r. 4 of the RCA particularly states that the procedure and practice in the Rules of Court 2012 shall apply *mutatis mutandis*. On the facts, by applying r. 4 and allowing the amendment, it will make the amendment retrospective as is the practice and procedure in civil cases. Once the amendment is allowed, the prayer to file out of time would become academic by operation of law as the amended notice of appeal will be deemed to have been filed within time and according to law. The granting of leave here to file the amended notice of appeal must only be seen as a consequential order. (paras 16, 17 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden telah dituduh di Mahkamah Sesyen atas kesalahan di bawah Akta Perindustrian Sekuriti 1983 ('Akta'). Di akhir kes pendakwaan, yang arif Hakim Mahkamah Sesyen memutuskan bahawa satu kes *prima facie* telah dibuktikan dan pembelaan dipanggil. Semasa permulaan kes pembelaan, pihak pembelaan telah membuat permohonan untuk merujuk satu persoalan berkaitan perlembagaan kepada Mahkamah Tinggi, yang telah dibenarkan oleh Mahkamah Sesyen. Berpihak kepada kedua-dua tertuduh, Mahkamah Tinggi memutuskan bahawa s. 122(1) Akta tidak konsisten dengan perkara 5(1) Perlembagaan Persekutuan memandangkan ia melanggar anggapan ketidakbersalahan dan sepatutnya ditolak sebagai tidak berperlembagaan. Tidak berpuas hati, pihak pendakwaan telah memfailkan rayuan terhadap keputusan tersebut dengan hanya menamakan responden pertama dan tidak memasukkan nama responden kedua dalam notis rayuan. Dengan itu, melalui lampiran 8(a), pihak pendakwaan telah memfailkan permohonan untuk meminda notis rayuan untuk menambah responden kedua, yang namanya telah ditinggalkan secara tidak sengaja dan sebagai langkah berjaga-jaga, telah memohon kebenaran untuk memfailkan notis rayuan di luar tempoh masa yang ditetapkan. Responden kedua, walau bagaimanapun, membantah permohonan tersebut.

Diputuskan (membenarkan permohonan dalam lampiran 8(a)) Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Apabila statut memberikan budi bicara kehakiman kepada mahkamah untuk membiarkan atau tidak membiarkan sesuatu salah aturan, sama ada substantif atau berprosedur, mahkamah mempunyai budi bicara luas untuk bertindak dan memutuskannya secara kehakiman dan bukan secara arbitrari. Secara kehakiman bermaksud mempertimbangkan jurisprudens, bersama dengan penghakiman mahkamah-mahkamah lain dan yang penting sekali, fakta kes, kepentingan awam, kepentingan perlembagaan perkara itu dan lain-lain lagi. Tiada kes yang akan mengikat mahkamah jika faktanya berbeza.

(2) Permohonan responden untuk membantah permohonan adalah bertentangan dengan konsep keadilan dan juga dilihat sebagai suatu penyalahgunaan kuasa mahkamah, ditambah lagi dengan percubaan untuk menghalang persoalan perlembagaan untuk

A diputuskan oleh mahkamah tertinggi yang telah dibangkitkan oleh responden sendiri. Tambahan, bantahan responden adalah salah tanggap memandangkan rayuan terhadap persoalan perlembagaan telah difailkan dalam tempoh masa yang ditetapkan.

B

(3) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') memberikan kuasa luas kepada mahkamah untuk melaksanakan budi bicaranya mengikut keadilan kes sama ada kes sivil atau pun jenayah. Tambahan, k. 4 KMR memperuntukkan bahawa prosedur dan
C amalan dalam Kaedah-Kaedah Mahkamah 2012 boleh dipakai secara *mutatis mutandis*. Berdasarkan fakta, dengan menggunapakai k. 4 dan membenarkan pindaan, ia akan menjadikan pindaan tersebut retrospektif berikutan amalan dan prosedur dalam kes-kes sivil. Apabila pindaan dibenarkan,
D permohonan untuk memfailkan diluar jangka masa akan menjadi akademik melalui penguatkuasaan undang-undang memandangkan notis rayuan dianggap sebagai telah difailkan dalam tempoh masa yang ditetapkan dan mengikut undang-undang. Kebenaran untuk memfailkan notis rayuan terpinda hanya
E dilihat sebagai perintah berikutnya.

Case(s) referred to:

Muhamad Asri Bakar v. PP [1996] 1 LNS 496 HC ***(refd)***
Nilabati Behera Alias Lalita Behera v. State of Orissa and Another [1993] AIR 1960 SC ***(refd)***
F *Ong Cheng Aik v. Dayco Products Singapore Pte Ltd (in liquidation) [2005] 2 SLR 561* ***(refd)***
PP lwn. Karpal Singh Ram Singh [2012] 5 CLJ 580 CA ***(refd)***
PP v. Ismail Abd Wahab [2013] 6 CLJ 588 CA ***(dist)***
Veerasingam v. PP [1957] 1 LNS 93 HC ***(refd)***
G *Wong Swee Chin v. PP [1977] 1 LNS 156 FC* ***(refd)***
Yap Ee Bee lwn. PP [1999] 1 LNS 382 HC ***(refd)***
Yusof Rahmat & Co v. Kamal Mohamad Noor; Asiah Mahmud (Intervener) [2004] 6 CLJ 141 HC ***(refd)***

Legislation referred to:

H Courts of Judicature Act 1964, s. 56
Federal Constitution, art. 5(1)
Rules of the Court of Appeal 1994, r. 4
Securities Industry Act 1983, s. 122(1)

I

For the appellant - Shanti Geoffrey (Mohd Hafiz & Munira Masood with her); DPPs
For the respondents - Hisyam Teh Poh Teik (N S Guok & Stephanie Wong with him); M/s Tan Hock Chuan & Co

[Editor's note: For the High Court judgment, please see PP v. Gan Boon Aun & Anor [2012] 9 CLJ 622.]

Reported by Kumitha Abd Majid

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's application, encl. 8(a) to amend the notice of appeal to include another respondent which was inadvertently left out and also to seek leave to file the amended notice of appeal out of time came up for hearing on 24 April 2013 and upon hearing the same, the application was allowed. My learned brothers Mohamed Apandi bin Haji Ali JCA and Linton Albert JCA have read the draft judgment and approved the same. This is our judgment.

Brief Facts

[2] Gan Boon Aun and Khiudin bin Mohd were charged in the Sessions Court for an offence under the Securities Industry Act 1983. The charge and alternative charge read as follows:

Principal charge:

> That you, between 28 February 2006 to 15 February 2007, at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, abetted Transmile Group Berhad (Company No. 373741-W) in making a statement that is misleading in a material particular in Transmile Group Berhad's "Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006" and the misleading statement is underlined in red in the Appendix to this charge, and the said statement is likely to induce the purchase of securities of Transmile Group Berhad by other persons, and when the statement was made Transmile Group Berhad ought reasonably to have known the statement is misleading in a material particular, and you have thereby committed an offence under section 86(b) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280) and punishable under section 88B of the same Act.

Alternative charge:

> That Transmile Group Berhad (Company No. 373741-W) between 14 February 2007 and 15 February 2007 at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, has committed an offence under section 122B(a)(bb) of the Securities Industry Act 1983 (Act 280) when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia Securities Berhad in Transmile Group Berhad's "Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006" and the misleading statement is underlined in red in the Appendix to this charge and that you, who at the time of the commission of the offence was a director of Transmile Group Berhad, are deemed to have committed an offence under section 122B(a)(bb) read together with section 122(1) of the Securities Industry Act 1983, and punishable under section 122B of the same Act.

[3] The trial against both the accused proceeded before the Sessions Court and at the end of the prosecution case the learned Sessions Judge ruled that a *prima facie* case has been established and called for defence.

[4] At the commencement of the defence case, the defence made an application for a referral of a constitutional question to the High Court, which was permitted by the learned Sessions Judge. The question posed before the High Court under case Registration No: 43-17-2011 was as follows:

> Whether the provision of section 122(1) (Act 280) of the Securities Industry Act 1983 is inconsistent with Article 5(1) of the Federal Constitution as it contravenes the presumption of innocence and ought to be struck down as being unconstitutional and therefore void.

[5] The High Court ruled in favour of both the accused and held that s. 122(1) of the Securities Industry Act 1983 was inconsistent with art. 5(1) of the Federal Constitution as it contravened the presumption of innocence and ought to be struck down as unconstitutional.

[6] The appellant being dissatisfied, within time filed an appeal against the said decision naming only Gan Boon Aun and in the notice of appeal had omitted to include the name of Khiudin bin Mohd and in consequence had filed this application to amend the

notice of appeal as well as a measure of prudence to seek leave to file the amended notice of appeal against Khiudin bin Mohd out of time.

[7] The appellant has set out the grounds of the application, and is substantially based on omission that it was a genuine mistake. In addition, the appellant had only come to know of the omission when the learned Deputy Registrar of the Court of Appeal pointed out the error during the case management stage.

[8] The appellant in reliance of s. 56 of the Courts of Judicature Act 1964 submits that the court has wide discretion to condone appeals out of time and formal defect and relies on a number of cases in this area of jurisprudence namely: (i) *Veerasingam v. PP* [1957] 1 LNS 93; [1958] MLJ 76, (ii) *PP lwn. Karpal Singh Ram Singh* [2012] 5 CLJ 580, (iii) *Yusof Rahmat & Co v. Kamal Mohamad Noor; Asiah Mahmud (Intervener)* [2004] 6 CLJ 141; [2004] MLJU 117, (iv) *Ong Cheng Aik v. Dayco Products Singapore Pte Ltd (in liquidation)* [2005] 2 SLR 561.

[9] Section 56 of the Courts of Judicature Act 1964 reads as follows:

> The Court of Appeal may in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for the purpose, enlarge any period of time prescribed by section 51 or 53.

[10] The learned counsel for the respondent (Khiudin Mohd) opposed the application and had relied on a number of cases to drive home the point why the application should not be allowed. The cases relied on are as follows: (i) *Wong Swee Chin v. PP* [1977] 1 LNS 156; [1977] 2 MLJ 194, (ii) *Muhamad Asri Bakar v. PP* [1996] 1 LNS 496 (iii) *Yap Ee Bee lwn. PP* [1999] 1 LNS 382; [1999] MLJU 131.

[11] We do not wish to elaborate or repeat what was said in those cases save to say when the statute places judicial discretion to the court to condone or not to condone an irregularity whether it is substantive or procedural, the court has wide discretion to act and decide upon it judiciously and not arbitrarily. Judicially means taking into cognisance the jurisprudence, as well as the judgments

of other courts and very importantly the facts of the case, public interest and constitutional importance of the matter etc. In consequence no one case will be binding on the court where the facts are different.

[12] This panel had dealt with this area of jurisprudence in great detail in *PP v. Ismail Abd Wahab* [2013] 6 CLJ 588; [2013] 1 LNS 291, and we have refused to allow the Public Prosecutor to file notice of appeal out of time and more so when the application to condone delay was not filed promptly. The panel of the Court of Appeal on the facts of the case had this to say:

> [12] We agree with the learned deputy public prosecutor that the court has discretion to condone delay in filing of notice of appeal. However, in our view the discretion should not be exercised and/or sparingly exercised when it relates to notice of appeal by the public prosecutor as opposed to the accused and the discretion to condone delay in respect of petition of appeal must be readily given unless it will result in miscarriage of justice. (emphasis is ours). Our reasons *inter alia* are as follows:
>
> (a) At common law the prosecution could not easily maintain a criminal appeal against the decision of the jury on all issues, more so on finding of facts.
>
> (b) Article 5(1) of the Federal Constitution gives special protection to the accused. The article reads as follows:
>
> > *No person shall be deprived of his life or personal liberty save in accordance with law.*
>
> (c) Section 307 of CPC as well as section 51 of CJA 1964 requires the notice to be filed within 14 days. That is the law and section 56 only relates to discretion and in the light of article 5(1) it is doubtful whether discretion can be exercised to defeat the constitutional provision. We are of the view that such discretion should not be exercised to the detriment of the accused/respondent.
>
> [13] The Indian equivalent of article 5(1) is article 21 of the Indian Constitution. In India the fundamental guarantee provision for protection of life and personal liberty has a rider, that is to say 'except according to procedure established by law'. The said Indian article reads as follows:
>
> > *No person shall be deprived of his life or personal property except according to procedure established by law.*
>
> [14] Article 5(1) has no such rider and in our considered view the procedure by way of discretion of court to extend time to file notice of appeal against the accused cannot be sustained in light

of article 5(1) of the Federal Constitution. Law in our Constitution and procedure in the Indian Constitution cannot be treated as synonymous, when exercising discretion. Law reflects element of certainty and procedure paves way for flexibility, discretion and judicial arbitrariness. In consequence it is our considered view that discretion should not be exercised against the accused when the law is that the prosecution must file the notice of appeal within 14 days.

[15] In the instant case notice of appeal was not filed according to the law and no application was filed to condone delay. On such facts we have no hesitation in dismissing the appeal *in limine*. In consequence the appeal is dismissed.

[13] In the instant case, there was no delay in filing the appeal in respect of the constitutional question as opposed to acquittal or conviction. The distinction must be kept in mind. The real question is whether the omission ought to be condoned. In addition, art. 5(1) of the Federal Constitution will not be applicable as the appeal is not one related to conviction or acquittal of the accused after trial, as was in the case of *PP v. Ismail Abd Wahab* (*supra*).

[14] Further, it was the accused who had framed the constitutional question for judicial decision and until the apex court deals with it, the issue will not be settled and it does not lie in the mouth of the respondent to obstruct a constitutional question to be ventilated by the apex court. When it comes to constitutional question, procedural compliance, time frame or technicalities, are never seen as an issue unless the applicant attempts to abuse the process of court. Support for the proposition is found in a number of cases. For example, the Indian Supreme Court had dealt with constitutional issues based on a complaint letter, where the statute or rules of court were not adhered to. And to protect the constitutional rights, lack of procedural requirements was not treated by the Supreme Court as an issue at all. (see *Nilabati Behera Alias Lalita Behera v. State of Orissa and Another* [1993] *AIR* 1960 SC)

[15] The respondent's application to object to the application on the facts of the instant case is abhorrent to the notion of justice and fair play and must also be seen to be an abuse of process of court, more so when it is an attempt to obstruct a constitutional question to be ventilated by the apex court which the respondent

himself has raised. We find no merit in the respondent's objection. In addition, the respondent's objection is also misconceived for the following reasons:

(i) The appeal against the constitutional question has already been filed within time.

(ii) On the assumption we dismiss the prosecution application for amendment and subsequently the Court of Appeal or the Federal Court set aside the decision of the High Court on the constitutional issue, the respondent will still have to proceed with the defence case at the Sessions Court.

[16] Further, when it comes to amendment, the Rules of the Court of Appeal 1994 ("RCA 1994") gives very wide powers to the court to exercise its discretion according to the justice of the case whether or not it is civil or criminal case as the 'appellant' under the RCA 1994 means:

> "appellant" means a person desirous of appealing from a decision of the High Court to the Court of Appeal and includes a person who has been convicted for a criminal offence in any court and who by any written law is entitled to appeal to the Court of Appeal.

[17] Further, r. 4 of the RCA 1994 particularly says the procedure and practice in the Rules of Court 2012 shall apply *mutatis mutandis*. Rule 4 states:

> Where no other provision is made by any written law or by these Rules, the procedure and practice in the Rules of Court 2012 shall apply *mutatis mutandis*.

[18] In the instant case, by applying r. 4 and allowing the amendment will make the amendment retrospective as is the practice and procedure in civil cases (see RC 2012). Once the amendment is allowed the prayer to file out of time will become academic by operation of law as the amended notice of appeal will be deemed to have been filed within time and according to law. And the granting of leave here to file the amended notice of appeal must only be seen as a consequential order.

[19] In consequence, the application in encl. 8(a) is allowed and the amended notice of appeal is to be filed and served within 10 days from the date of this order.